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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 183.

HENRY W. GRUNEWALD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER GRUNEWALD.

EDWARD J. BENNETT,
Counsel for Petitioner,
30 Broad Street,
New York 4, New York.

HAROLD H. CORBIN,
New York City,
Of Counsel.

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I.

The government's brief, in substance, concedes that the conviction on the conspiracy under Count 1 may be sustained only upon the theory that a subordinate conspiracy, within the original conspiracy, existed to conceal the original crime, so that any act of concealment thereafter, by any of the original conspirators, could be said to bring the original conspiracy down within the period of limitations.

They further concede that overt acts of concealment, after termination of the original conspiracy, would not

avoid the bar, for they say, in their summary of argument, that, in that situation, the *Krulewitch* case would be controlling.

Essentially, the government's claim is that:

1. The subordinate conspiracy to conceal from all future investigating agencies must be implied from the original crime, for they say:

> (a) "From the very nature of the conspiracy * * * there had to be * * * agreement to conceal * * *" (Government Brief, p. 51).
>
> (b) "Discovery of the fraud * * * would jeopardize the success of the entire conspiracy." (Government Brief, p. 51).
>
> (c) "Concealment of all phases of the operation was absolutely essential." (Government Brief, p. 52).

As to this argument, the necessity to imply a continuing agreement to conceal because open profession of the crime would lead to arrest and prevention, it has already been twice rejected by this Court in *Krulewitch* v. *United States,* 336 U. S. 440 and *Lutwak* v. *United States,* 344 U. S. 604.

2. The subordinate conspiracy to continue to conceal for all the future is established by ordinary furtive conduct in the course of commission of the crime, so that any act or crime of concealment thereafter revives the crime and is chargeable to all of the conspirators. In support of this, they cite three items.

> (a) They say "the conspirators, in all their contacts with their tax evading clients, * * * carefully withheld the identity of their contact man in the capital." (Government Brief, p. 52).

(b) They say an innocent attorney, Saver, was allowed to think that he had accomplished the result, though the contrary was the case. (Government Brief, p. 53).

(c) They say that the money was required to be paid in cash, so it could not be traced. (Government Brief, p. 53).

This is scarcely more than the implication of the conspiracy for all the future from the very commission of the crime, already discussed under item 1 above. However, it does not, in any event, suffice to establish any such future continuing conspiracy. Criminals do not come out in the public square to do their misdeeds. Of course, they try to cover the commission of the crime while it is in progress. The agreement to do so is merely the agreement to do the crime in secret. It is not an agreement to commit a host of crimes in the future. Such acts are done with the immediate end of the crime in view. If the conspirators subsequently agree upon a new crime, that subsequent conspiracy may be charged and proven, but it does not revive the old crime or defeat the bar of the statute upon the old crime. In short, when criminal A authorizes criminal B to accept payment of a bribe and insists that it be paid by cash, rather than by check, he does not authorize criminal B to murder a witness three years later. If criminal B, three years later, does murder the witness, it does not make criminal A liable for the murder or defeat a defense of the statute of limitations.

Every factor relied upon by the government in the instant case was present in the *Lutwak* case, 344 U. S. 604. There, as here, there were efforts at concealment during commission of the crime, such as spurious claims of marriage, false statements, etc. There, as here, there

were subsequent efforts, after the immediate object of entry into the United States had been obtained, to conceal by having a witness cover up the facts. Yet, the Court held that the conspiracy ended when the illegal entry was accomplished, despite the allegation that it was continued by an original agreement to continue to conceal. Nor did original surreptitious conduct, with subsequent efforts to conceal, suffice to extend the life of the conspiracy.

Even a general purpose to conceal is not a criminal conspiracy.

The whole idea that a general purpose to conceal binds conspirators together in a continuing criminal conspiracy is wrong. There can be no obligation on a criminal, in view of the Fifth Amendment, to reveal his crime. Undoubtedly, all criminals hope that the crime will lie concealed. Their joint hope will easily be construed to be a joint purpose. But a mere charge of agreement or purpose to conceal does not charge a criminal conspiracy. A criminal conspiracy must be one which either defrauds the United States or contemplates the commission of a crime. Until some such criminal purpose arises, concealment is merely a hope or a purpose or motive. It may be directed to perfectly legitimate means. For example, the most direct possible concealment, as when a criminal asserts the privilege under the Fifth Amendment, would not be criminal, nor would an agreement to do so be criminal. Similarly, a general desire to acquire money would not be criminal. It is only when there is an agreement upon an illegal method that the criminal conspiracy begins. So, if and when joint criminals agree upon doing some illegal act, they then enter a criminal conspiracy. Concealment here is only a motive. It is the agreement upon the new

criminal act which marks the new criminal conspiracy. The motive of concealment is not the crime.

Accordingly, it is urged that conviction of the conspiracy under Count 1 of the indictment was wrong in that conviction was barred by the statute of limitations.

II.

The government brief, in a footnote at page 84, suggests that, even if it were error to permit cross examination of defendant Halperin as to his grand jury testimony, this would be error only as to Halperin, because it was only Halperin's constitutional rights which were involved. This argument is far off the point as to the effect of the error upon the other defendants. As demonstrated in our main brief, page 33, Halperin was an essential witness for the defense and a particularly critical witness to the defendant Grunewald, for he directly contradicted not only the entire case for the government, but the prime piece of direct testimony relied upon to bring Grunewald into the conspiracy. The destruction of Halperin's credibility then necessarily destroyed Grunewald's defense. It is the improper impeachment of the important defense witness, entailing insuperable damage to the defense, which affects Grunewald's rights in the trial.

Witnesses may not be illegally destroyed on the theory that it is only the witness who is hurt. Such a principle would make travesty of a trial. In a far less obvious case, where evidence illegally seized from one defendant was used on trial against both, this Court has held that both were entitled to a new trial (*McDonald* v. *United States*, 335 U. S. 452).

For these reasons all defense counsel repeatedly objected to this cross examination (R. 685-703) and the petitioners are fully entitled to the benefit of their exceptions.

Respectfully Submitted,

EDWARD J. BENNETT,
Counsel for Petitioner.

HAROLD H. CORBIN,
Of Counsel.